United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

[CORRECTED COPY]

76-2073

To be argued by
ALAN LEVINE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2073

MILTON SILVERMAN,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Milton Silverman appeals from orders entered on May 7, 1976 and July 16, 1976, in the United States District Court for the Southern District of New York by the Honorable Edmund L. Palmieri, United States District Judge, respectively denying without a hearing Silverman's motion pursuant to Title 28, United States Code, Section 2255 to vacate his sentence and denying a motion for reargument.

Indictment 68 Cr. 762, filed on September 18, 1968, charged petitioner Milton Silverman in eighteen counts with embezzlement of union funds and falsification of union books and records, in violation of Title 18, United States Code, Section 664 and Title 29, United States Code, Sections 431(c), 436, 439 (b)(c) and 501(c).

On March 14, 1969, Silverman was found guilty on sixteen of the eighteen counts in the indictment after a nine day jury trial before Judge Palmieri. He was sentenced to four months' imprisonment on each of Counts 1-15, to run concurrently, and four months' imprisonment on Count 18 to run consecutive to the terms imposed on the other counts. On appeal, this Court affirmed Silverman's conviction with respect to eight counts (Counts 9-15 and Count 18) and reversed with respect to the first eight counts. *United States* v. *Silverman*, 430 F.2d 106 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971), *reh. denied*, 403 U.S. 924 (1974).* A review of a motion for a new trial, denied by Judge Palmieri, was consolidated with the direct appeal from Silverman's conviction and the District Court's order denying the motion was affirmed.

Silverman completed his term of imprisonment on December 21, 1971.

On March 21, 1972, the District Court (Palmieri, *D.J.*) denied without a hearing Silverman's first motion under Title 28, United States Code, Section 2255. In that section 2255 petition Silverman claimed that the proof at trial constituted an impermissible amendment of Count 18, in violation of his Fifth Amendment rights. The denial of that motion was affirmed by this Court in open court following oral argument. *United States* v. *Silverman*, 469 F.2d 1404 (2d Cir. 1972), *cert. denied*, 411 U.S. 982 (1973).

On October 2, 1975, Silverman filed the present motion pursuant to Title 28, United States Code, Section 2255, seeking an order vacating his conviction. By order entered May 6, 1976, Judge Palmieri denied this motion,

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* The result of the appeal was to reduce the total fines from $16,000 to $8,000, but to leave the eight month prison sentence unimpaired.

without a hearing, on the grounds that it was without merit, void of support in the trial record or in the affidavits submitted to the Court and sought to relitigate issues argued to the jury and reviewed on direct appeal. By order entered July 16, 1976, Judge Palmieri denied without a hearing a motion to vacate the District Court's opinion and order of May 6, 1976, on the ground that petitioner had raised no substantial evidentiary questions to require a hearing for any purpose.*

Statement of Facts

1. Silverman's Conviction

For a full statement of the facts in the *Silverman* case, the Government respectfully refers the Court to the panel's opinion in *United States* v. *Silverman*, *supra*, 430 F.2d at 109, 112-13, 117-24, and to the Government's brief in that appeal at pp. 8-27 (Docket No. 33584).

In sum, the evidence at trial demonstrated that Silverman was the principal officer and dominant force of four affiliated labor organizations—two locals, a joint welfare fund and a joint pension fund.** Silverman was convicted of embezzlement of union funds and falsification by him of records and reports of the two local unions, including fabrication of executive board minutes to con-

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* Silverman's present appeal was dismissed for lack of prosecution on October 12, 1976. A motion to reinstate the appeal was denied without prejudice on December 14, 1976 and a second motion to reinstate was granted on February 23, 1977.

** Silverman was President of Local 810, International Brotherhood of Teamsters; Business Manager of Local 1614, International Brotherhood of Electrical Workers; and a Trustee and the Administrator of United Wire, Metal and Machine Welfare Fund and United Wire, Metal and Machine Pension Fund.

ceal the defalcations. The embezzlements took the form of a blank check in the amount of $1,200 cashed by Silverman for his personal use (Count 9), four $2,000 payments from the union made to Silverman for the fictitious purpose of reimbursing him for Christmas gifts (Counts 10-13), and $1,000 cash received by Silverman from the sale of a used air conditioner that belonged to the welfare fund (Count 14). Among the falsifications charged (Counts 15 and 18), the evidence showed, *inter alia*, fabrication of a 1965 minute book page to indicate a spurious authorization for Silverman's "Christmas gratuities" payments charged in Counts 10-13. An FBI laboratory analysis revealed that these minutes had been altered, prior to their submission to the grand jury, to indicate the purported executive board authorization to Silverman of these payments.

2. Count 18—Government Witness Jacob Friedland

Attorney Jacob Friedland was retained by Local 810, one of the unions dominated by Silverman, after the local received a grand jury subpoena *duces tecum* seeking production of various records, including the minutes of the meetings of the local's executive board during 1965. Friedland examined the records, including the minutes, and made a report to the union prior to submission of the records to the grand jury.

Friedland testified in the Government's direct case that he had no independent recollection of whether the resolution authorizing the Christmas gratuities had been in the 1965 minute book when he examined it in 1967. The Government sought production of Friedland's report to the union in an effort to refresh his recollection. After the trial judge overruled a claim of attorney-client privi-

lege with respect to the production of the Friedland report, Friedland claimed his Fifth Amendment privilege.

The Government then obtained immunity for Friedland and called him as its sole witness on rebuttal. After being asked about the condition of the minutes at the time of his review, Friedland testified that his "memory had been refreshed with respect to these minutes and basing it entirely on the report it indicates a change in the minutes." (Tr. 979).* Friedland then testified that his report "states that there is a loan to Milton Silverman in December, 1965, and there is no approval of this loan by the executive board." (Tr. 980, 971-93).

On direct appeal this Court held that the Friedland report was not a confidential communication between attorney-client with respect to the contents of the minutes and stated:

> "Since the alteration was to supply approval for a loan to Silverman and perhaps authorization for Christmas gratuity payments, the jury could have determined that Silverman was responsible for the alteration." *United States* v. *Silverman*, *supra*, 430 F.2d at 121.

3. Count 14—Government Witness Paul Chlystun

In February, 1966, the welfare fund controlled by Silverman purchased a building at 10 East 15th Street in New York City. Paul Chlystun was the superin-

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* Page references to the transcript of Silverman's trial are cited as "Tr."; references to the Appendix are cited as "App."; "GX" refers to Government Exhibits introduced at the trial.

tendent for the general contractor retained by Silverman to perform the renovation job of that building. Chlystun testified that he found a used air conditioner in that building and that he was instructed by Silverman to sell it to a scrap dealer for $1,000. Chlystun then testified that he gave the $1,000 cash proceeds from that sale to Silverman at the union's office. That money was never turned over to the welfare fund to which it belonged and was the basis for Count 14 in the indictment. (Tr. 397-401, 426, 438-46, 491-92, 451-54, 537-38).

Silverman, testifying in his own behalf, denied ever receiving the money from Chlystun and claimed Chlystun was hostile to him. The defense also attempted to show that the air conditioner was not worth $1,000 and that other scrap dealers would never buy a used air conditioner. Additional witnesses testified that whatever money was paid for equipment recovered at a building site undergoing renovation belonged to the construction workers on the job, rather than to the welfare fund as owner of the building. Chlystun testified to his understanding of the custom in the trade and concluded that the money belonged to the fund.

In a motion for a new trial on the basis of newly discovered evidence, denial of which was consolidated with the direct appeal, Silverman alleged that he could establish an alibi defense for the date Chlystun testified he paid Silverman. The defense claimed, *inter alia*, that the significance of the date had not been anticipated prior to trial. Judge Palmieri denied the new trial motion, without a hearing, and this Court affirmed. *United States* v. *Silverman*, *supra*, 430 F.2d at 118-20.

4. Silverman's Present Petition

In this third collateral attack on his conviction Silverman claimed that the prosecution knowingly used per-

jured testimony and failed to produce material exculpatory to the defendant. He specifically alleged the following: (1) that the testimony of Jacob Friedland with respect to the falsification of the minutes was perjurious and that the Government knowingly solicited that testimony; (2) that the testimony of Paul Chlystun about the sale of the air conditioner was perjurious and that the Government could have ascertained this fact had its investigation developed certain lines of inquiry; and (3) that the proof of Silverman's domination and control of Local 810, as evidenced by Government's Exhibit 47, was false.* Silverman also claimed that his conviction for embezzlement of the proceeds of the air conditioner could not stand because an interpretation of certain contract provisions relating to the welfare fund indicated that the air conditioning unit was not the union's property.**

5. Silverman's Belated Subpoena

While the present motion was *sub judice*, Silverman served a subpoena *duces tecum* on the Government which required production of certain documents at a purported hearing on the following day.*** (App. 138A). No hearing or other proceeding was scheduled by the District

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* During the grand jury investigation which resulted in this indictment a notice was posted at the union's office which read as follows:

> "If you are approached by any Federal investigators do not give them any information. Refer them to our attorney, Mr. Shivitz. Anyone disregarding this order will be *summarily terminated.*
>
> (GX 47). (Emphasis in original).
>
> Milton Silverman

** In opposition to the motion, the Government submitted the affidavit of Andrew Maloney, Esq., the prosecutor at Silverman's trial, and a memorandum of law.

*** The subpoena was filed on March 8, 1976 simultaneously with Silverman's reply papers on the original petition.

Court; nor had the District Court "so ordered" the subpoena. The Government did not respond to the subpoena. Silverman belatedly sought enforcement of the subpoena and was denied relief by Judge Palmieri.

6. The District Court's Decision

In a carefully considered seventeen page memorandum-order, entered on May 7, 1976 (App. 116-32), Judge Palmieri, who presided at Silverman's trial, rejected Silverman's claims as totally without merit. Specifically, with respect to the claim of perjury by Friedland and the alleged suppression of evidence, Judge Palmieri found no basis whatsoever for the allegation that Friedland committed perjury, and similarly no support for the claim that the Government had any awareness of it. Regarding the witness Paul Chlystun the District Court concluded that Silverman was merely relitigating the issue regarding ownership of the air conditioner "using different tactics," which issue had been already fully explored at the trial and on direct appeal. Finally, Judge Palmieri found Silverman's relitigation of the issue of Silverman's domination and control of the unions "a gross imposition on the Court." (App. 132).*

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* The District Court's appropriate characterization of this claim in Silverman's petition has been taken out of context on two occasions by Silverman and used to support the application for Judge Palmieri's recusal. Silverman first cited the court's statement in his motion for reargument in the District Court. Judge Palmieri made perfectly clear that this characterization was intended solely to describe petitioner's last claim. (App. 164-65). Even with the District Court's correction of Silverman's blatant misrepresentation, Silverman relies on that quotation to support the application in this Court for recusal of Judge Palmieri.

In response to Silverman's motion for reargument, the District Court again carefully reviewed Silverman's claims and, in a thorough eleven page opinion, found no basis for any evidentiary hearing. With respect to Silverman's request for an order requiring production of the documents sought in the subpoena *duces tecum*, the District Court refused to enforce the subpoena "served so tardily and not . . . thereafter pressed." (App. 159). Moreover, the court concluded that the subpoenaed documents, reviewed *in camera*,* would not "cast doubt on any of [the court's] findings." (App. 161). Silverman's belated motion for Judge Palmieri's recusal was rejected as improperly made and founded upon "blatant misrepresent[ations]." (App. 164).

ARGUMENT

The District Court Properly Denied Silverman's Motion Pursuant to 28 U.S.C. § 2255.

Silverman's motion alleged several instances of the knowing use of perjury by Government witnesses and suppression of evidence important to the defense case. Judge Palmieri properly concluded that these claims are all without merit.

A. Allegations of Perjury and Suppression of Evidence in Connection with Friedland's Testimony —Count 18

Silverman's main contention in the District Court was that the Government knowingly used the perjurious testi-

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* Although the Government opposed Silverman's subpoena, it provided the requested documents to the District Court for *in camera* review and so advised Silverman's attorney. (App. 176-77).

mony of Jacob Friedland to secure defendant's conviction on Count 18, which charged Silverman with falsification of a minute book subpoenaed by the federal grand jury investigating this case. In support of the claim that Friedland committed perjury, Silverman proffered the sworn affidavits of two union employees, Sophie Oschak and Max Sanchez, and one Herman Brickman. The substance of those affidavits was that Friedland, upon being advised by them that the executive board had approved the loan and payment to Silverman, instructed Sophie Oschak to alter the minutes of the executive board to reflect such approval. Silverman claims these affidavits proved that Friedland perjured himself when he testified that he had no independent recollection of the contents of the minutes and who might have altered them.*

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* These affidavits, described as newly discovered evidence, come from witnesses who were at least equally available to be called by the defense at the time of trial. Two were union employees who Judge Palmieri accurately described as under the defendant's control during the time period of the trial. The third was known by the employees to be present at the time of the events. The failure to present evidence from the sources at the time of trial was a clear failure to exercise due diligence, a factor that precludes the present claim. *United States* v. *Stofsky*, 527 F.2d 237, 244 (2d Cir. 1975), *cert. denied*, 425 U.S. 902 (1976); *United States* v. *Costello*, 255 F.2d 876 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958); *United States* v. *Marquez*, 490 F.2d 1383 (2d Cir. 1974), *aff'g on opinion below*, 363 F. Supp. 802 (S.D.N.Y. 1973), *cert. denied*, 419 U.S. 826 (1974)

It is not answer that the two union employees claim to have been intimidated by the Government and therefore were unavailable to be called by the defense. The two union employees were present in the courthouse during portions of the trial, and, in view of their relationship with the defense, clearly could have and should have been interviewed by defense counsel. If defense counsel had interviewed them any claim of intimidation could have been brought to the attention of the trial judge in an application for appropriate relief. Silverman's failure to show that such minimally "due diligent" steps were taken at trial plainly demonstrates the lack of merit to the claim of intimidation. *United States* v. *Stofsky, supra.*

A plain reading of Friedland's testimony at trial makes clear that Silverman has not satisfied his burden on a motion under section 2255 of demonstrating that the alleged perjurious testimony was in fact false, that it was material to his conviction or that it was instigated by the Government or committed with its knowledge. *Hoffa* v. *United States*, 339 F. Supp. 388, 392-93 (E.D. Tenn. 1972), *aff'd*, 471 F.2d 391 (6th Cir.), *cert. denied*, 414 U.S. 880, (1973). *See also*, *McBride* v. *United States*, 446 F.2d 229 (10th Cir.), *cert. denied*, 405 U.S. 977 (1971); *United States* v. *Dansby*, 291 F. Supp. 790, 793 (S.D.N.Y. 1968), *aff'd mem.*, Dkt. No. 33104 (2d Cir., Sept. 12, 1969); *United States* v. *Gonzalez*, 33 F.R.D. 280 (S.D.N.Y. 1960) (Kaufman, D.J.), *aff'd*, 321 F.2d 638 (2d Cir. 1963).

Most importantly, Silverman has not demonstrated that Friedland's testimony was false, let alone that he committed perjury. Friedland testified that he had no independent recollection of the contents of the minutes. Silverman argues that Friedland's denial of present recollection was perjurious. However, Silverman presented no factual basis to support this conclusory allegation. Mere speculation, such as this, is insufficient to state a valid claim under section 2255. *United States* v. *Franzese*, 525 F.2d 27, 31 (2d Cir. 1975), *cert. denied*, 424 U.S. 921 (1976).

Moreover, as Judge Palmieri found, it was plausible that Friedland would have no independent recollection given the span of years between the acts alleged and his testimony. The answer certainly was not so inherently incredible as to raise an inference that Friedland committed perjury. See *Mesarosh* v. *United States*, 352 U.S. 1 (1956); *United States* v. *Zane*, 507 F.2d 346, 348 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

Furthermore, nothing Silverman has proffered here contradicts anything Friedland testified to at trial. Contrary to Silverman's claim, Friedland was not asked who altered the books, nor did he testify that he did not know who altered them. The Government made it clear beforehand that it would examine Friedland only about what his report indicated. If defense counsel wished to inquire on cross-examination about Friedland's possible participation in the alteration of the minutes, he was free to do so. Defense counsel chose not to make the inquiry.

Silverman attempts to imbue this claim with significance by speculating, without any basis whatsoever, that had Friedland truthfully testified he would have exculpated Silverman from participation in the alteration of the executive board minutes. Support for this claim, however, simply cannot be found in the affidavits of Oschak, Sanchez and Brickman, which only go so far as alleging that Friedland instructed Oschak to alter the minutes. It is a *non-sequitur* to suggest that if Friedland caused the minutes to be altered Silverman was uninvolved. After all, when Friedland reviewed the union's records he did so pursuant to the directions of Silverman, who hired him as counsel on behalf of the union to respond to the grand jury subpoena. See *United States* v. *Stofsky*, 527 F.2d 237, 247 (2d Cir. 1975), *cert. denied*, 425 U.S. 902 (1976).*

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* In *United States* v. *Stofsky, supra*, a case involving unlawful labor payments by fur manufacturers to union officials, evidence was developed post-trial that the Government's witness, Glasser, had additional "bloated bank accounts" about which he had not testified. Glasser testified that he received monies from fur manufacturers. In response to a motion for a new trial this Court stated: "It is a *non sequitur* to suggest that the discovery of larger sums of money from some source establishes that he did not pass to defendants a share of what he concededly received from the fur manufacturers." 527 F.2d at 247.

In the absence of any showing of perjury, *a fortiori* Silverman necessarily failed to demonstrate that the Government knowingly used perjured testimony. Silverman relies on the fact that immunity was conferred on Friedland to support the claim of Government knowledge that Friedland was involved in the crime. However, Friedland's testimony did not negate the possibility of his involvement. In any event, the District Court correctly observed that the Government had no knowledge from Friedland of what he would say. As the District Court found:

> Friedland was closely involved with Silverman and his union activities, was a hostile witness who declined to confer with the Government, and gave the Government no advance knowledge of what he could say if he could be made to testify. He was extremely reluctant to testify and did his best to avoid giving any testimony. He successfully quashed a grand jury subpoena. When first called to testify at trial, he asserted an attorney-client relationship both with respect to Silverman and Local 810 as a basis for declining to answer. When this claim of privilege was rejected, he claimed protection under the Fifth Amendment and again declined to testify. These tactics completely prevented the Government from using his testimony in its direct case." (App. 122-123).

Faced with the fact that a fair reading of Friedland's testimony in context will not support the claim of perjury, Silverman makes the related, but different, argument that the Government suppressed evidence of Friedland's alleged participation in the alteration of the 1965 executive board minutes. Specifically, Silverman contends that the evidence he has now produced was deliberately suppressed by the Government. To press this claim Silverman relied

on a colloquy among the trial judge, defense counsel and the prosecutor in which the latter stated that the Government had some evidence "linking" Friedland with the book's alteration.*

As Judge Palmieri noted in denying Silverman's motion in the District Court, after the prosecutor made the

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* The colloquy took place in the following context: Friedland, when called to testify in the Government's direct case, invoked his Fifth Amendment privilege against self-incrimination. The trial court then inquired whether the Government knew of any evidence "link[ing]" Friedland to the alleged alterations. The prosecutor responded affirmatively and was thereafter not asked by either the court or defense counsel to explain his response.

Out of the exercise of extreme caution, Judge Palmieri then decided to honor Friedland's invocation of the privilege, and stated as follows:

> "The Court: I prefer to be on safe ground. What concerns me is the doctrine of the link in the chain of evidence. This link in and of itself is not incriminating. Nobody could possibly persuade me that it is incriminating, and I am sure that Mr. Friedland's testimony would not in itself be incriminating. And because it would not incriminate and because it would not incriminate anybody but the defendant or persons in league with him on this charge of fabrication, I have declined to sustain this claim of privilege under the Fifth Amendment on the ground that it does not protect him from incriminating third parties. But what makes me hesitate was your answer to my question as to whether he was a target on the basis of other evidence, and when you answer that question in the affirmative, you placed me in a position where I am afraid I have to sustain his claim of privilege, because I can't tell what a future investigator, another United States Attorney might possibly do in linking this separate and independently unincriminating evidence with other and possibly incriminating evidence in a chain of events that might constitute a possible case against Mr. Friedland, and I certainly don't want to be a party to any procedure which would deprive him of his rights under the circumstances." (Tr. 651-52).

statement in open court "petitioner here apparently made no request for the allegedly suppressed evidence." (App. 162). *See United States* v. *Agurs*, 427 U.S. 97 (1976); *United States* v. *Keogh*, 391 F.2d 138, 147 (2d Cir. 1968). Thus, Silverman deliberately ignored the opportunity to make specific inquiry of the Government with respect to the prosecutor's statement in the earlier colloquy. On this basis alone, Judge Palmieri was justified in concluding that the present claim of suppression was frivolous.* *United States* v. *Agurs*, *supra*. Moreover, the prosecutor's statement was sufficient to have triggered a searching cross-examination of Friedland by Silverman's counsel if such a line of inquiry was deemed helpful to the defense. Plainly, however, Silverman concluded that any possible impeachment of Friedland in this regard could have been accomplished only at substantial cost to his own chance of acquittal and thus made the tactical decision to argue that no alteration had occurred.** Judged in this

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* Judge Palmieri rejected Silverman's contention that the prosecutor's statement itself proved suppression of evidence. His decision was plainly sound. Read in proper context, the prosecutor's statement indicated no more than that circumstantial evidence pointed to Friedland's participation in the alteration of the minutes—whether knowingly or otherwise—and thus gave rise to a proper basis for invocation of the privilege.

** Indeed, as Silverman must have known, inquiry into Friedland's participation in the alteration most likely would have been devastating to the defense. Friedland was retained by Silverman to respond to the grand jury subpoena which compelled production of the documents, including the executive board minutes. Friedland did not have any possible personal motive for alteration of the books and records, except for his loyalty to Silverman, who employed him. Accordingly, any such testimony at the minimum, only would have created additional circumstantial evidence of Silverman's authorization of the alteration, in flat contradiction of the defense that the payments to Silverman were all correct and proper. Clearly, defense counsel made the sensible tactical choice to forego any exploration of Friedland's role in that alteration. *Cf. Wojtowicz* v. *United States*, Dkt. No. 76-2106, slip op. 1905 (2d Cir. Feb. 22, 1977).

context, the District Court's rejection of Silverman's claims as without merit was clearly correct.

B. Allegations of Perjury and Suppression Relating to Chlystun

Silverman contended in the District Court that the Government should have known the testimony of Paul Chlystun was perjurious and that the Government used that testimony to secure his conviction. In support of this claim Silverman proffered the affidavit of Lawrence Cohen, project engineer for the general contractor in charge of renovation of the welfare fund building. The substance of Cohen's affidavit was that he directed Chlystun to contact the subcontractor about removal of the air conditioning units, that Chlystun told him the units had been removed, but that Chlystun did not tell him he had given the $1,000 proceeds from the sale of one unit to Silverman. Silverman also alleged that the Government suppressed statements by Chlystun indicating his bias against Silverman, prior inconsistent statements of Chlystun regarding the source of the $1,000 cash, and notes of an interview with the subcontractor's representative, Irving Marcus, identified in the Cohen affidavit.

Applying the governing standard of review set forth above, *see supra* at 11, Silverman failed to make out a valid section 2255 claim of knowing use of perjury.

First, it is manifest that no perjury was committed. Nothing proffered by Silverman contradicts Chlystun's testimony that he sold one air conditioner to a scrap dealer for $1,000 and thereafter gave the proceeds to

Silverman.* Indeed, Silverman has not cited to any portion of the trial transcript allegedly inconsistent with the information now claimed to have been newly discovered. Thus, this claim of perjury, like the Friedland claim, is no more than innuendo which, without more, merited summary rejection, as Judge Palmieri in effect concluded. *United States* v. *Franzese*, *supra*, 525 F.2d at 31; *Dalli* v. *United States*, 491 F.2d 758, 760-61 (2d Cir. 1974).

Second, as Silverman must concede, there is absolutely no proof nor any suggestion that the Government had knowledge of either the matters to which it is claimed Cohen would have testified or any allegation of Chlystun's alleged perjury. Rather, incorrectly relying on *United States* v. *Agurs*, *supra*, Silverman makes the transparent claim that the Government should have developed prior to trial the same facts that have taken him over six years to ferret out. Obviously, the Government had no obligation to develop facts with regard to such a collateral matter. Moreover, as this Court stated in response to Silverman's earlier motion for a new trial based on newly discovered evidence,

> "[i]t is hard to understand how any conduct by the prosecution could have prevented defense counsel from investigating and presenting [such testimony] before the end of the trial." *United States* v. *Silverman*, *supra*, 430 F.2d at 120.

Accordingly, even if Chlystun committed perjury at trial —and there is not one iota of competent proof that he did—Silverman's motion still was palpably insufficient to justify relief under section 2255. *See* Point E, *infra*.

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* At most, Silverman could have used Cohen in his defense case to divert the jury's attention from Silverman's conversations with Chlystun, which, of course, would not have disproved Silverman's improper receipt of the $1,000.

Equally without substance are Silverman's allegations that the Government failed to turn over material relating to possible impeachment of Chlystun. Silverman's claim "upon information and belief" (App. 114) that the Government's files house information that indicates Chlystun's desire to secure a conviction of Silverman, is no more than an unsubstantiated and frivolous allegation. On its face, this claim was insufficient to raise any basis for habeas corpus relief. *Dalli* v. *United States, supra.** Similarly, Silverman's bald-faced allegation that Chlystun at one time told the Government he was unsure of the source of the $1,000 cash given to Silverman, is no more than imaginary fancy, and is not accompanied by any evidentiary basis for the allegation. Consistent with Silverman's other contentions, such mere conclusory allegations were plainly insufficient to sustain a valid claim under section 2255. *United States* v. *Franzese, supra,* 525 F.2d at 31.**

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* In any event, Chlystun's possible bias against Silverman was a matter fully explored during Chlystun's cross-examination and was affirmatively raised by Silverman himself, who testified that Chlystun was hostile to him because he had been fired from his position as superintendent of the construction job. The jury was sufficiently apprised of a possible bias on Chlystun's part so that any further information in the same vein would have been no more than cumulative impeachment. *See United States* v. *Pacelli,* 521 F.2d 135, 137-39 (2d Cir. 1975), *cert. denied,* 424 U.S. 911 (1976); *United States* v. *Rosner,* 516 F.2d 269, 273-74 (2d Cir. 1975), *cert. denied,* 427 U.S. 911 (1976).

** Silverman also claimed that the Government suppressed notes of an interview with Irving Marcus, a representative of the subcontractor who allegedly was present when Chlystun met the scrap dealer at the building site to sell the air conditioner. Marcus did not testify at the trial. No claim is made that Marcus told the Government anything favorable to the defendant Silverman, and no proffer was made as to what his testimony would be. Certainly, this claim, as well, merited summary denial. *United States* v. *Franzese, supra.*

C. Newly Discovered Evidence

Silverman's final claims in the District Court rested on newly discovered evidence. Six years after conviction, Silverman proffered additional evidence relevant to Count 14, which charged him with embezzlement of the proceeds of the air conditioner. On that charge Silverman claimed to have uncovered "new" evidence that the air conditioner was not the property of the welfare fund.* In addition, Silverman challenged all the charges of the indictment with new evidence purportedly negating the Government's proof of his domination and control of the unions. In the context of a motion pursuant to Rule 33 such claims would be insufficient. Argued here, in a section 2255 motion, Silverman's contentions are patently frivolous. *Cf. Brach* v. *United States*, 542 F.2d 4 (2d Cir. 1976).

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* In an effort to portray this additional evidence more properly within section 2255, Silverman argues that the testimony with respect to the air conditioning equipment could have been determined by the Government during its investigation and such failure constitutes governmental misconduct. To support this allegation, Silverman suggests certain other lines of inquiry which should have been pursued with witnesses interviewed by the Federal Bureau of Investigation and other witnesses who should have been interviewed. However, no explanation is offered to excuse petitioner's own failure to have developed such testimony in connection with his new trial motion some six years ago, or during the intervening years. As stated by this Court in a similar context, courts "do not employ the omniscience of a Monday morning quarterback as the standard for determining what investigation should have been made by the Government." *United States* v. *Stofsky, supra*, 527 F.2d at 244. What the defendant Silverman claims the Government failed to do falls far short of even a negligent failure to investigate. *See United States* v. *Stofsky, supra; United States* v. *Keogh, supra.*

1. The Ownership of the Air Conditioner

Chlystun testified for the Government that according to the custom in the industry the proceeds of the sale of the air conditioner properly belonged to the welfare fund. At trial Silverman offered evidence to contradict Chlystun on this point. Petitioner now offers two additional witnesses, Robert Blakeman, Esq., and Lawrence Cohen, who would testify that under the custom in the trade the air conditioner would not have belonged to the welfare fund. In addition, Blakeman would testify that an interpretation of the contract between the welfare fund, general contractor and other parties indicates the air conditioning equipment was not the property of the welfare fund.

This claim merely attempts to present cumulative evidence on an issue fully litigated at trial and was properly denied for that reason alone. *Meyers* v. *United States*, 446 F.2d 37 (2d Cir. 1971). Moreover, no showing was made as to why the defendant could not have called either of these two witnesses at trial or presented this evidence in his two earlier collateral attacks on this conviction. More than six years have passed since that conviction. Certainly this Court must find that the "doctrine of finality . . . should preclude such consideration." *Brach* v. *United States*, *supra*, 542 F.2d at 8.

2. Silverman's Control and Domination of the Union

Equally frivolous is petitioner's second claim of newly discovered evidence relating to the issue of his domination and control of the unions. At trial, the Government introduced such evidence to prove intent and to

negate the anticipated defense that the expenditures were authorized and undertaken for the benefit of the unions. Introduced into evidence was the so-called "gag order," (GX 47) which was signed by Milton Silverman and which instructed all union employees not to talk to federal investigators during the grand jury investigation. Confronted on the stand with the document, Silverman denied writing it, had no recollection if he approved it, but was familiar with the thought expressed in it. (App. 131-32). The admissibility of such evidence was hotly contested at trial and on appeal. *See United States* v. *Silverman, supra,* 430 F.2d at 123-24.

Again some six years after conviction petitioner now proffers the affidavits of a union employee and an attorney for the union which state that the attorney instructed the employee to prepare the so-called "gag order" and that it was prepared without Silverman's knowledge. The attempt to label such proof *newly* discovered is astounding. The attorney submitting the affidavit, David Shivitz, was not only available to the defendant Silverman prior to trial, but he was actually present in the courtroom. It is no wonder that Judge Palmieri properly described this contention as "a gross imposition on the court." (App. 132). The failure to present the evidence at trial precludes the effort now made to vitiate the conviction on this basis, and in any event, the testimony, which is cumulative of petitioner's other proof on the issue, does not begin to amount to a sufficient basis for a claim under section 2255. *See Brach* v. *United States, supra,* 542 F.2d at 7-8; *United States* v. *Costello, supra.*

D. Silverman Was Not Entitled to Discovery

In this Court, Silverman contends that the District Court erred in denying him discovery on his motion to

establish the Government's knowledge of perjury and suppression of evidence. Silverman also claims that it was error for the District Court to review, *in camera*, immunity memoranda concerning Friedland which were submitted to the Department of Justice. These claims merit swift rejection, but, unfortunately, first necessitate review of the factual circumstances in which Silverman's request was made.

1. Silverman's subpoena

Despite the Government's voluntary agreement with Silverman to provide access to the files in this case prior to his motion, Silverman later sought by a subpoena *duces tecum* unspecified additional material which he claimed was exculpatory evidence relating to the alleged perjury of Friedland and Chlystun. (App. 179, 181-83). This subpoena was served on the Government simultaneously with Silverman's reply affidavit and purported to require production of the material at a hearing the following day. No court proceeding or hearing had been scheduled, nor had the District Court "so ordered" the subpoena. Accordingly, the Government did not respond to it. (App. 18).

Thereafter, Silverman did not seek compliance with the subpoena.* Judge Palmieri then denied the motion on May 7, 1976, finding Silverman's claims totally without merit and unsupported by the record. While Judge Palmieri did not specifically address Silverman's request for discovery, it is clear that the District Court found

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* In his reply affidavit Silverman's attorney made passing reference to the service of a subpoena on the Government. He did not, however, ask the Court to enforce the subpoena at that time.

Silverman's allegations both factually and legally insufficient to require further production of documents, let alone a hearing on the motion.

Dissatisfied with the result of Judge Palmieri's decision, Silverman then sought reargument and, for the first time, an order enforcing the subpoena *duces tecum.** The Government opposed Silverman's request for discovery as totally inappropriate, but, nevertheless made available to the court for *in camera* review two intra-agency memoranda ** relating to the Friedland immunity request.*** (App. 176-77).

By order dated July 16, 1976, the District Court denied Silverman's motion to reargue and refused to enforce his subpoena *duces tecum* on the grounds that it was "served so tardily and was not thereafter pressed." Moreover, with respect to the substance of petitioner's demand for discovery, Judge Palmieri concluded that the request lacked "sufficient specificity to gainsay that claim" and reiterated his earlier determination that

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* Silverman claimed that the Government had represented to his counsel that an adjournment *sine die* had been obtained for compliance with the subpoena. The Government's memorandum in opposition to the motion to vacate denied that such a representation had been made. The District Court stated that no request for adjournment was sought or granted. (App. 158).

** These documents had been specifically identified in Silverman's subpoena *duces tecum*. The documents provided to the District Court were a memorandum of former Assistant United States Attorney Andrew J. Maloney, Esq. to the Department of Justice, dated March 11, 1969 and a memorandum of the Assistant Attorney General dated March 12, 1969. The memorandum were sealed by the District Court and are available in the record on appeal for this Court's inspection.

*** Naturally, petitioner's counsel was advised that the documents had been submitted to the court *in camera*.

Silverman's overall contentions were without merit. (App. 159). Finally, after reviewing *in camera* the immunity memoranda, Judge Palmieri concluded that there was no evidence either of Friedland's alleged perjury or of the Government's purported awareness thereof, in either document. In sum, the District Court concluded that the documents "did not cast any doubt on [the Court's] findings" and found "no reason to depart from its prior decision." (App. 161).

2. The District Court Properly Refused Enforcement of the Subpoena

In the context of Silverman's belated and improper subpoena *duces tecum* his arguments concerning denial of discovery are plainly wrong.

First, given Silverman's insubstantial claims and the District Court's conclusion that his motion had failed to approach the burden of showing a valid claim under section 2255, it was clearly within the court's discretion to deny further discovery. *See, Brach v. United States, supra.* In view of Silverman's failure to press diligently for enforcement of the subpoena until long after the District Court's initial decision, the amount of material that the Government voluntarily had turned over to petitioner, the lack of specificity in the subpoena itself, and the utter absence of merit in the motion, Judge Palmieri surely did not abuse his sound discretion in denying further production of documents.

Second, the District Court reviewed the subpoenaed material and concluded that the memoranda did not support Silverman's claims. Thus, in any event, Silverman

was not prejudiced by the refusal to enforce the subpoena. *Brach* v. *United States, supra.**

E. No Hearing on Silverman's Motion Was Required

Silverman claims that the District Court committed error in denying his motion without a hearing. Since the sum total of his motion did not give rise to any meritorious basis for relief from conviction, it is plain that no evidentiary hearing was required.

With respect to the claims of knowing use of perjury, Judge Palmieri properly found that Silverman's motion failed to make any credible showing that the prosecution was aware of the perjury in either Friedland's or Chlystun's testimony. (*See, supra* at 13-14, 17). Thus, Silverman's contentions were reduced to no more than claims of

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* Silverman's contention that the District Court committed error in reviewing the Government's immunity memoranda *in camera* simply is frivolous. Ample authority exists under statute and case law for the Government to submit to the court *in camera* material which in the Government's view does not relate to the subject matter under inquiry in the proceeding. Cf. 18 U.S.C. § 3500(c); *United States* v. *Pacelli*, 491 F.2d 1108, 1118 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *Covello*, 410 F.2d 536, 546 (2d Cir. 1969), *cert. denied*, 396 U.S. 879 (1970). Plainly, if Judge Palmieri had concluded that the information truly reflected on the merits of Silverman's motion, the District Court would have expressed its concern for that procedure and taken corrective action. Moreover, as Judge Palmieri noted (App. 160), *in camera* review was the precise course he would have followed had a motion been made to quash the subpoena.

simple perjury without Governmental awareness—plainly insufficient to entitle him to section 2225 relief.*

Notwithstanding the dubious substance to Silverman's perjury claims, Judge Palmieri considered Silverman's motion as if the perjury claims had been factually established in petitioner's favor and nevertheless found that such perjury probably would not have altered the jury's verdict. *United States* v. *Stofsky*, *supra*, 527 F.2d at 246. The District Court's conclusion in this regard was clearly correct. Given Friedland's relationship with Silverman, the impeachment value of the former's perjury would have been far outweighed by the compelling inference that Friedland's alteration of the books was undertaken at Silverman's direction. Similarly, Chylstun's perjury on collateral matters would not have advanced significantly the substantial attack that already had been made unsuccessfully on his credibility. Accordingly, in view of the patent lack of merit to Silverman's contentions of perjury, Judge Palmieri's denial of the motion without a hearing on such claims was plainly correct. *United States* v. *Franzese*, *supra; Romano* v. *United States*, 516 F.2d 768, 771 (2d Cir.), *cert. denied*, 423 U.S. 994 (1975); *United States* v. *Slutsky*, 514 F.2d 1222 (2d Cir. 1975).

Equally insufficient to have required a hearing were Silverman's newly discovered evidence claims, founded

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* Although demonstration that the Government knowingly used perjurious testimony to secure the conviction of a defendant raises a due process claim which is cognizable under section 2255, a showing of simple perjury, without Government awareness, does not stand on the same footing. Indeed, this Court has specifically cast doubt whether such a naked claim of perjury, without more, states a claim under section 2255. *Brach* v. *United States*, *supra*, 542 F.2d at 8; *United States* v. *Franzese*, *supra*, 525 F.2d at 31 n.7.

upon, as they were, persons clearly available to the defense before and during trial. Judge Palmieri found that those claims—even if taken as true—were merely cumulative of matters fully litigated at trial and therefore not likely to have affected the eventual outcome of Silverman's trial. The District Court therefore properly concluded, without a hearing, that these contentions as well lacked merit. *Brach* v. *United States, supra.*

In the last analysis, this Court should accord Judge Palmieri's careful and thorough opinions great weight. Far from the outrageous and unsubstantiated allegation of bias, unfairly leveled by Silverman, Judge Palmieri, like the district judge in *United States* v. *Franzese, supra*, "had the advantage of intimate familiarity with the case, born of many pre- and post-trial motions and a long trial where he had the opportunity to observe the witnesses." 525 F.2d at 32 (footnotes omitted.) The District Court, therefore, was in the best possible position to assess the likely impact on Silverman's trial of the claimed perjury and newly discovered evidence. Accordingly, Judge Palmieri properly exercised his discretion to deny the petition without a hearing. *Sanders* v. *United States*, 373 U.S. 1, 20 (1963); *Machibroda* v. *United States*, 368 U.S. 487, 495 (1962).

CONCLUSION

The orders of the District Court should be affirmed.

Respectfully submitted,

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

ALAN LEVINE, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 1st day of APRIL, 1977 he served a copy of the within Briefs (Corrected Copy) by placing the same in a properly postpaid franked envelope addressed:

Lloyd Hale, Esq.
36 West 44th Street
New York, N.Y.

And deponent further says that he sealed the said envelope and placed the same in the mail box drop for mailing FROM the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Alan Levine

Sworn to before me this
18t day of April 1977
Gloria Meyer

GLORIA MEYER
Notary Public, State of New York
No. 31-0535340
Qualified in New York County
Commission Expires March 30, 1979